November 18, 1999

In the Matter of:		
Fred F. Sankow, Jr. Claimant		
v.	Case Nos.	1998-LHC-1465 1999-LHC-1096
General Dynamics Corporation Employer/Self-Insurer		
and	OWCP Nos.	1-124347 1-117806
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest		

Appearances:

David N. Neusner, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on July 1, 1999 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for

a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
RX 13A	Attorney Proctor’s letter filing the	07/08/99
RX 13	Form LS-208, dated January 23, 1997, with reference to Claimant’s July 1, 1992 shipyard injury	07/08/99
RX 14A	Attorney Proctor’s letter filing the	07/15/99
RX 14	Notice relating to the taking of the deposition of Frank Maletz, M.D.	07/15/99
RX 14B	Notice rescheduling the deposition of Dr. Maletz for Tuesday, October 5, 1999	08/31/99
ALJ EX 8	The parties were granted an extension of time to file the doctor’s deposition testimony	09/01/99
RX 15A	Attorney Proctor’s letter filing the	10/14/99
RX 15	Deposition Testimony of Dr. Maletz	10/14/99

The record was closed on October 14, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times and Claimant’s last day of work was on July 14, 1997.

3. On February 7, 1991 and July 1, 1992, Claimant suffered

injuries in the course and scope of his employment.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on December 16, 1998.

7. The applicable average weekly wage is $646.34 as of the 1992 injury.

8. The Employer voluntarily and without an award has paid temporary total compensation for the 1992 injury in the amount of $80,232.07. Medical benefits thus far total $31,138.97.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Fred F. Sankow, Jr. ("Claimant" herein), fifty-three (53) years of age, with a high school education and an employment of manual labor, began working on July 25, 1977 as a shipfitter at the Groton, Connecticut shipyard of the Electric Boat Corporation, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. (TR 17-20; RX 12) Claimant's duties as a fitter are described as follows by the Employer (ALJ EX 4):

FITTER. Lays out and fabricates metal structural parts, such as plates, bulkheads, and frames, and braces them in position within hull of ship for riveting or welding: Lays out position of parts on metal, working from blueprints or templates and using scribe and handtools. Locates and marks reference lines, such as center, buttock, and frame lines. Positions parts in hull of ship, assisted by RIGGER (ship and boat bldg. & rep.) Aligns parts in relation to each other, using jacks, turnbuckles, clips, wedges, and mauls. Marks location of holes to be drilled and installs temporary fasteners to old part in place for welding or riveting.

Installs packing, gaskets, liners, and structural accessories and members, such as doors, hatches, brackets, and clips. May prepare molds and templates for fabrication of nonstandard parts. May tack weld clips and brackets in place prior to permanent welding. May roll, bend, flange, cut, and shape plates, beams, and other heavy metal parts, using ship machinery, such as plate rolls, presses, bending brakes, and joggle machines.

Dr. Howard G. Abbott, a Board-Certified orthopedic surgeon, examined Claimant at the Employer's request and the doctor reports as follows in his May 10, 1991 report (ALJ EX 4):

He has not returned to work since the incident.

He states he is doing much better and he hopes that in the very near future he will be able to return to work on a light duty status first, followed by regular duty if he progresses satisfactorily.

PAST HISTORY: His past history is completely negative for any problem with his back. He is on no other medication for any medical illnesses.

PHYSICAL EXAMINATION: Physical examination in our office on that date reveals a man who is 5'11" tall and weighs 165 pounds. He walks with a normal gait and can walk on his heel or toes normally. His leg lengths are equal and he has a normal Trendelenburg examination of both hip joints.

Examination of the lumbosacral spine reveals a range of motion of 37 degrees in flexion and lateral bend is normal. There is no tenderness on today's examination. Straight leg raising is normal bilaterally. The reflexes of both lower extremities are within normal limits. There is no hypesthesia to either lower extremity.

X-rays of the lumbosacral spine the patient brought with him are essentially within normal limits, except they do show some calcification in the anterior longitudinal ligament between L3 and L4.

DIAGNOSIS: Lumbosacral sprain with sciatic nerve irritation.

ASSESSMENT: Based on today's examination, it appears this condition is causally related to his injury on February 7, 1991.

The patient has some objective findings on examination.

Treatment thus far has been very appropriate and is resulting in alleviation of his symptoms. He has not quite reached a maximum medical improvement and I feel that he should continue his therapy for another two to three weeks.

I have reviewed the patient's Job Description as a Shipfitter and noted the physical demands placed upon the work.

At the present time, the patient is not capable of his usual work. However, he could perform some full time light work which avoids any lifting over twenty pounds or frequent bending. After two to three weeks of light duty and improvement, he may be capable of resuming his usual work.

Dr. Steven B. Carlow who first saw Claimant on March 13, 1991 also saw Claimant on May 29, 1991 (RX 5-4):

Follow up evaluation (to) rule out L4-5 on the right. Overall the patient is doing a bit better, actually is (SIC) major complaint now is some cervical pain after doing a lido test in PT. He states that the back is tolerable. He has been on Ansaid and Tranxene prescribed by Dr. Donald Cooper, which has helped significantly. His only problem is some diarrhea probably related to the Ansaid.

They see no need for surgical intervention, neurosurgically and I have discussed this with the patient.

Evaluation today reveals normal NV status, negative SLR. He still has tenderness in the left paralumbar region and left paracervical region.

At this point we will DC (discontinue) the Ansaid... continue with the Tranxene and aggressive PT, both for his neck and lower back, hopefully in 1 month time symptoms will improve. He understands this may be a somewhat chronic problem, but I see no need for further intervention at this point. He will be followed up in 1 month.

Dr. Carlow re-examined Claimant on September 5, 1991 and the doctor reports as follows (RX 5-6):

Follow up evaluation LS strain, (to) rule out HNP. The patient finished therapy approximately 2 weeks ago, work hardening program and was doing fairly well, but still with residual lumbosacral

pain. His cervical pain had improved significantly.

Since that time he has been doing some odd jobs at home. Occasionally taking Advil for inflammation.

He denies any weakness, numbness of his lower extremities, but still aching and pain in his lumbosacral area radiating to his anterior groin regions bilaterally, left greater than right.

Assessment - I have discussed the situation with the patient at length, feel that attempted return to work would be appropriate and was given a note to return on 9/16/91. He will be seen after that time or call me to let me know how he is doing. I see no need for further intervention at this time. Hopefully he will be able to return without significant problems.

Dr. Carlow next saw Claimant on February 26, 1992 and the doctor states as follows in his progress note (RX 5-7):

The patient is here due to exacerbation of his back upper, lower, thoracic and right sided hip pain. It has been approximately 5 months since last evaluation. He has been working since that time but with persistent pain related to activities. Due to this he is here for re-evaluation. He has had no evaluation since my last evaluation. He has been on Voltaren and Vicodan as needed for pain with some relief. He usually takes approximately 2 a day of the analgesics.

He now complains of neck pain, radiating down the right side, trapezial pain, and lower back pain at all times. He has completed his back school and therapy.

Evaluation today reveals no NV abnormality, neg SLR, DTR intact. Back motion is limited in forward flexion and extension secondary to pain and is tender along the parathoracic and scapular region to palpation without significant spasm.

Assessment - exacerbation thoracic LS strain. I have no further recommendations other than continue with PT, local modalities, Vicodan only as needed for extreme pain. He understands this and will continue working. I see no other alternatives other than finding a lighter type of work activities. He understands this and will continue working at this time. He will get back to me if he has increasing problems.

Dr. M. J. Halperin who first saw Claimant on November 17, 1992 (CX 4-1) examined Claimant on July 7, 1993 and the doctor states as follows in his report (RX 4-9):

DATE	7/7/93
DUTY STATUS	Able to work light duty
RETURN	for preoper H&P
DIAGNOSIS	Cervical spondylosis
MEDICATION	none

Fred returns after seeing Dr. Salame. Dr. Salame agrees that surgery might be beneficial. However, Dr. Salame raises the issue of whether or not anterior surgery should be performed versus posterior approach. My feelings are that anterior surgery would be too risky to remove such a large osteophyte, and that since most of his constriction is far laterally, I think Fred ought to do well with posterior decompression.

Plan is to have him return for preoperative H&P. As far as work is concerned, I have returned Fred to the ability to do light duty. Fred is willing to try to return to work, however his wife is upset about this because she states that when he does return to work he comes back in severe pain. I explained to Fred that although he does have arthritis and does have pain in his neck as a result of this, there is no reason why he cannot do some type of light duty. Work restriction form is filled out and we will have him return here for preoperative H&P.

Dr. William H. Druckemiller, a neurosurgeon, examined Claimant on July 23, 1993 and the doctor states as follows in his report (ALJ EX 4):

IMPRESSION: Patient has diffuse musculoskeletal pains. There is a question of whether or not some of his arm pain is radicular, but it does not fit the criteria for a classic radiculopathy and there are no hard neurological findings.

He has degenerative changes of the cervical and lumbar spine. There is a fairly large spur at 3-4 on the left side, which is consistent at least with the side of his symptoms. However, his symptoms are much more diffuse than that and I rather doubt that decompression of fusion of that level would give him significant total relief.

In terms of his low back, he has some mild degenerative changes at 4-5 and 5-1, nothing surgical at this point in time and he should continue back exercises.

He finds that his most significant problem is every time he tries

to return to work he has increased pain. I do not think he is likely to change significantly and at this point in time he should be considered to have reached a point of maximum medical improvement from his injury and should consider settling his case and alternative employment. He has a 15% permanent partial impairment of the cervical spine secondary to his injury. He has spondylosis as a significant pre-existing condition, which made his injury materially and substantially worse, probably amounts to two-thirds of the total impairment of the neck.

He has a 5% permanent partial impairment of the lumbar spine, again with lumbar spondylosis as a pre-existing condition which represents at least two-thirds of his problem.

Claimant has also been referred to the Johns Hopkins Anesthesiology and Critical Care Medicine, Division of Pain Medicine, and Dr. Maywin Liu reports as follows in her May 27, 1994 report (CX 2-7):

HISTORY: I had the pleasure of seeing Mr. Sankow today for a right-sided L5 nerve root block. Mr. Sankow reports that he has a work related injury that occurred in 1991. There is still apparently litigation pending on this case.

He reports today that his pain is located in the right groin and the right medial thigh. He also reports that he has some pain that radiates down the lateral aspect of the foot. He rates his pain at rest as a 3-3/10 with activity such as standing, bending, extension, and (with) flexion his pain goes to a 6/10. He has had no pain medication this morning.

On May 25th he had a right L4 nerve root block which was apparently a block of the true L4, out of six lumbar vertebrae. Activity seems to exacerbate his pain. He also had on May 24th an L3-4, L4-5, and L5-S1 lumbar facet blocks with 0.5% bupivacaine. His pain went from 2/10 at rest to a 1-2/10 for approximately four hours. It also appears that this latter facet block was more than likely an L4-5, L5-L6 and L6-S1 lumbar facet block as this patient obviously has six lumbar vertebral bodies under fluoroscopy today...

ASSESSMENT: A successful block of the right L5 nerve root. Successful block is based on the results of an appropriate loss of sensation in the medial aspect of the foot in what could be an appropriate dermatomal distribution for this patient's L5 nerve root given the fact that he has six lumbar vertebrae. The patient does report that he has had about a 50% pain relief following what may not have been a successful nerve block based on the lack of objective neurologic changes with the first nerve block. I also

find it somewhat disturbing that this patient did have sensory changes in the upper medial aspect of the thigh in a nondermatomal distribution following this nerve block procedure. Therefore, given the history and findings on today's block result, I suggest the following recommendations:

PLAN:

1. Given the fact that this patient has six lumbar vertebrae, it might be worth considering doing an L6 nerve root block.
2. Alternatively, you may want to consider adding another higher level to a set of facet blocks, (e.g., L3/4, L4/5, L5/L6, L5/S1) since he does have six lumbar vertebrae. It is unclear to me whether the first set of nerve blocks had actually included the appropriate levels requested because the patient has six lumbar vertebrae and the blocks were reported as L3-4, L4-05, and L5-S1.
3. This patient may be a candidate for further evaluation by behavioral medicine and/or Drs. Clark and Cohen to assess if there is also some nonorganic component involved in this gentleman's pain.

ADDENDUM: Will await 24 hour pain diary follow up.

Claimant also underwent a discogram to further evaluate the lumbar pain and Dr. Allan J. Belzberg described the procedure as involving "(p)rovocative lumbar discometric and discography at L3-4, L4-5, L5-S1" levels (CX 2-9):

INDICATIONS: Mr. Sankow has a longstanding history of both cervical and lumbar pain problems as well as lumbar facet blocks. Unfortunately he continues to be plagued by both back and right lower extremity pain.

Dr. Belzberg gave the following impression (**Id.**):

The patient clearly has multi-level degenerative disease with the most severe degenerative level being the L4-5 level. In terms of pain reproduction the L4-5 level most closely matches the patient's pain problem, reproducing back and lower extremity pain. However, the L3-4 and L5-S1 levels were also moderately painful. In summary, it appears that the L4-5 level is clearly pathologic and involved in the patient's main pain generation level. However, it should be noted that the L3-4 and L5-S1 levels are also both degenerative and moderately painful but not to the degree of L4-5.

Don M. Long, M.D., Ph.D., Harvey Cushing Professor of Neurosurgery and Director, Department of Neurosurgery, Johns

Hopkins Medical Institutions, sent the following letter to Dr. David L. Simon in Cincinnati on June 6, 1994 (CX 2-13):

I enclose a copy of the discography report on Mr. Fred Sankow and I have previously sent a letter to him. Mr. Sankow has called my office concerning pain medications. It is my practice not to change medication schedules given by other physicians until I take responsibility for the patient's longitudinal care. I have told Mr. Sankow that I would indicate to you this policy and suggest that his medications continue at your discretion until he comes here for a probable surgical procedure.

Three weeks later, on June 28, 1994, Dr. Long sent the following letter to Dr. Simon (CX 2-15):

I have reviewed all of the studies of Fred Sankow and everything points to the L-4-5 space as the most probable cause of his problem. I have discussed his situation with other members of our spinal team in our Spine Conference. I would say the concensus is about 50/50 with posterior versus anterior surgery. This means that there is no strong preference, one over the other and the outcome is likely to be quite similar. I will have a telephone appointment with Mr. Sankow to discuss whether he wishes to proceed.

Dr. Long also examined Claimant on May 1, 1995, at which time he wrote (CX 2-20):

His symptoms remain about the same. He saw Dr. Randy Davis in February. Dr. Davis and I have discussed the issues since that time. The problem with Mr. Sankow is that he has three levels of degenerative disc disease and that anything we do is likely to involve all three. I personally think the chance of a surgical procedure benefitting him is not very great and the risk of complication or failure is substantial. He continues to function at work and I don't think the outcome of surgery is likely to be good enough to warrant a procedure.

On the other hand, he is still complaining about the neck and that has not been re-evaluated recently. The potential outcome of surgery is substantially better for the neck than for this level of low back pain.

I would like him to have a cervical MR at home which he can send to me. I think if focal disease can be identified, we certainly would consider a procedure on the neck. If the abnormalities are as widespread as in the low back, I favor not considering any surgery. I think the question is important enough that we should obtain the MR and then we will make a decision about next steps.

The following day Dr. Long sent the following letter to the Claimant (CX 2-22):

I am pleased to recommend the whirlpool bath for you. As I told you on your clinic visit, I would rarely recommend something like a whirlpool as a medical necessity. However, given your underlying problem and your willingness to continue working, I think it is very reasonable to use a whirlpool to augment your other conservative care measures. I have no question that it will keep you functional longer and certainly allow you to function better both at home and at work.

Dr. Joseph W. Peters examined Claimant on May 11, 1995 at the Employer's request and the doctor concluded as follows (ALJ EX 4):

IMPRESSION: Chronic neck and low back pain, with prior imaging studies documenting severe spinal degenerative changes, including disc pathology. Despite the patient's chronic condition, he has been able to continue at a light duty position. Further evaluation of the patient's cervical spine is pending. There are some mild neurological deficits in the right lower extremity, suspected related to spinal pathology.

PLAN

1. Cervical spine MRI was done at Backus on 5/10/95. Results of this will be reviewed by the patient's physician in Maryland. Further treatment decisions will be based on that result. The patient will forward results of those tests to me, and then further recommendations will be made regarding treatment.

2. The patient gave me a work form today regarding work restrictions. Some preliminary restrictions were outlined. However, results of the cervical MRI are needed to make final recommendations. The patient may need a functional capacity evaluation to determine whether or not he can continue at his present light duty status.

3. Possibility of an aqua therapy program was discussed with the patient, but he said that he has never been a particularly proficient swimmer.

4. Once the patient has contacted me regarding the cervical MRI results, further recommendations will be made.

Claimant underwent additional diagnostic testing at JHH and Dr. Belzberg reports as follows in his May 20, 1996 operative note (ALJ EX 4):

There were no technical difficulties at the conclusion of study. At the time of discharge from the radiology suite, the patient was feeling well with no untoward effects.

Impression: The patient demonstrates multi-level degenerative disc disease in the cervical spine. The C3/4 level was not studied as it was not requested. However, on reviewing the patient's MRI exam post procedure, it appears that he also has quite pronounced disease at the C3/4 level. On cervical discography, the 4/5 and 5/6 are both clearly degenerative and pain sensitive segments reproducing a degree of the patient's pain response. However, it is difficult to know whether it is truly concordant pain in that the patient himself has trouble delineating where his pain normally is. Finally, the 6/7 level shows mild degeneration and mildly positive pain response, but is certainly less provocative than the 4/5 and 5/6 levels. Because the patient cannot give a good description of his usual pain, other than to say it hurts in the neck, it is difficult to know whether the 6/7 is concordant, according to the doctor.

Cynthia Burd, L.C.S.W., B.C.D., sent the following letter to Claimant's attorney on August 6, 1996 (CX 8):

Please excuse the delay in my getting this note off to you regarding Mr. Sankow's psychotherapy needs. I have to say that although there are several conclusions that Dr. Borden made in his "independent medical evaluation" of Mr. Sankow that I can logically agree with, there is no doubt in my mind that the issues Mr. Sankow deals with in his sessions with me <u>are</u> causally related to work-related injuries to his neck and back. Mr. Sankow is not an individual who can benefit at this time from insight-oriented psychotherapy to treat the depression he continues to suffer from. I need to take more of a supportive but cognitively realistic approach in helping Mr. Sankow sort through his emotional isues, and these issues center (and <u>need</u> to center) on what he is going to do about beginning a brand new occupation, accepting that this is what he has to do, and making the emotional transition out of Electric Boat into something less familiar and new. These are tremendously meaningful tasks for Mr. Sankow, and he finds this process difficult to face. With my help and the therapeutic relationship he has with me, I truly believe this process is progressing the best that it can, which ultimately will result in success for Mr. Sankow.

My plans for future treatment continue to be weekly sessions until Mr. Sankow's Depression is stabalized (sic) and he is adjusted into a new job or technical school situation. Mr. Sankow refuses to consider the use of anti-depressant medication which I have continued to emphasize as an important part of his treatment, but he has agreed to keep an "open mind" about its use in the near future.

I am hopeful that once Mr. Sankow is situated in a job that can provide him a sense of accomplishment and financial stability, and that is suitable to the physical restrictions his injuries have placed on him, Mr. Sankow's progress will be good. Mr. Sankow's childhood issues may never be resolved in what most psychotherapists would consider curative, and he may always struggle with some degree of dysthymia and/or depression, but with continued sobriety and the knowledge that psychological help is available to him, he should maintain a content and meaningful life.

Dr. Frank W. Maletz who first saw Claimant on March 28, 1996 (CX 1-1) examined Claimant on January 28, 1997 in followup and the doctor reports as follows (CX 1-4):

After the break in January Fred went back to work, alleged acceptance as a draftsman. The minute he was back on site he was told to go to medical. He came in today with a report from medical which I have difficulty reading because of the handwriting and also the circuitous grammar, but from the best I can determine and from Fred's comments, he was told that he would be back on the boats, he would be back wearing hard helmets when he was on the boats, and also because he has some prescribed medications, anything that happened to him would be his own responsibility given that he was taking medicines. I had specifically selected medicines that could be used prn with him in a working environment already specific on my note to EB of 1/8/97. As a result of going back to EB he also passed up an opportunity to do drafting elsewhere which would not have involved boats and it was the understanding that he would not be required to go on the boats and would work in the drafting office only. He has multilevel cervical disc disease as well as lumbar spine disease and the wearing of any weights on his head is expected to reexacerbate his radiculopathy. I am trying very hard to protect him from additional injury, further compression on the spine and the ultimate possibility of surgery. I had no problem with him returning to Drafting School but the provisos were listed and specified and have been clear and unaltered since I first started seeing him.

His clinical examination today finds him off medicine now for two weeks, oriented and alert. His mobility is still limited in the cervical spine, somewhat limited in the lumbar spine. He has

excellent shoulder, elbow, forearm, wrist and hand motion and no fixed neuropathy and no residual nerve deficit. His shoulders range fully. His clinical examination of his hands reveals good bilateral grip strength. Straight leg raising test is negative bilaterally and his lower extremity motors, reflexes and sensibilities are intact.

My recommendations are to see him back in follow-up for a clinical recheck and we will be happy to reevaluate him in a month. A copy of this report along with the copies of the work notes that were given him have been sent to Attorney Neusner with a subsequent letter. The patient was returned to work, recommended to take an evening and at bedtime dose of Ultram and Skelaxin and recheck in one month.

Diagnoses as listed, according to the doctor.

Dr. Maletz re-examined Claimant on March 24, 1997 and the doctor reported as follows (CX 1-5):

Fred presented today. He continues to work.

He still has limited range of motion with a fixed list to the left side and limited range of rotation and lateral flexion to the right. Neurologic status in the upper extremities is normal for motors, reflexes and sensibilities. Shoulders range well and there is no instability. His wrist and hand function looks excellent. Clinical exam of his lower lumbar spine reveals loss of extension. His hips, knees, and ankles range well with no fixed list or spasm. Clinical exam is consistent with full and unrestricted hip and knee motion and no peripheral joint symptoms are noted.

The Ultram and the Skelaxin continue to be relatively satisfactory for pain controls.

My recommendation is to see him back in follow-up for a clinical recheck in a month. We are still working very hard through the auspices of the attorney to have covered the obtaining of the whirlpool for him and also the appropriate work controls based on his permanency. We will see how the April 4th meeting develops and see how he progresses.

Dr. Maletz re-examined Claimant on June 17, 1997 and the doctor states as follows (CX 1-5):

Fred was seen March 24, 1997 and in early April I received a letter from Embry & Neusner. Apparently, though no communication has been received directly from EB, all of his medications have been disallowed. I have no indication from Dr. Kathryn Johnson at the

yard hospital as to what might be allowed. It is clear that Fred represents a different status or should at least relative to work at the yard. He is not on subs. He is not required to go to the boats and, therefore, would not be a risk. He does require chronic muscle relaxant medicines to occupy a 10 hour day. His present status is that he is working 10 hours, 5 days a week, sitting at a computer desk and drafting. By Friday he is just about able to walk and then takes most of the medications for the week over the weekend. He is barely functioning by Monday morning and then tries, by sheer will power, to get through the week, creating another cycle of intensified muscle spasm and increased pain. At the conclusion of all of this, this certainly is not adequate either pain control or medical care at this point, and I think we are creating a more chronic pain situation by not getting his pain better controlled. The patient stated that he has not seen Dr. Johnson for an evaluation. The attorney reflects, on that letter, whether some medications might be allowed at work and that has not been explored.

The clinical examination is unchanged. At the present, Fred is exactly as he appeared in March. He is clearly uncomfortable with marked loss of range of motion in his cervical and lumbar spines. He has very significant decreased range on deep chest inspiration but no fixed neuropathy as revealed by no loss of reflexes or motor strength.

His best medication controls to date have been Ultram and Skelaxin and he was able to work and retrain with that medication onboard.

No information has been received to date on the whirlpool issue and that was not addressed in the attorney’s letter and, therefore, he has essentially been without any physical therapies for a considerable period of time.

At present the patient is: 1. Not functioning well; 2. Poorly pain controlled; and 3. Still, in my view, not a surgical candidate. I have asked that he take a letter that I wrote personally to Kathryn Johnson for evaluation and to answer the following questions: 1. Is his status the same as someone on the boats in view of the corporate risk policy?; 2. Could medications be allowed for him to use during the week and, if so, could a published list of those medications be made available to me for review?; and, 3. Allowing that his work situation will be 10 hour work days at the computer screen, what allowances may be made relative to his ability to get up and walk about?

The clinical examination is consistent with his diagnoses of multiple level cervical discopathy, myofascial syndrome, and lumbar spondylosis.

Once answers are achieved with the questions listed we will see him back of follow-up in a month. Darvocet was refilled.

Dr. Maletz issued the following disability rating report on July 15, 1997 (CX 1-7):

As was noted in the April 8, 1997 letter from David N. Neusner, patient Fred Sankow was upbeat about retraining for his new job. This involved retraining for computer drafting. Since being seen in March the retraining has progressed and some issues relative to his being able to take pain medications while on the job, including muscle relaxants, have been rectified through the help of Kathryn L. Johnson, M.D., Medical Director at EB. Despite this, the patient has found that working in front of the computer terminal causes him horrendous difficulties with respect to increased cervical pain. All of his symptoms are exacerbated. He has had no relief whatsoever. As noted previously, he had been double dosing with the medications during the weekends and taking no pain medicine at all during the week. This resulted in severe symptom accrual. He was unbelievably frustrated today by all of his efforts to retrain, get back to work, and yet despite this, nothing has relieved his symptoms. He is frustrated by the headaches that he has been having as a result of working over the computer screen, and it is quite clear to me that despite the efforts that EB has made, and despite the efforts the patient himself had made at this retraining, it is not working. We are getting increased symptoms and the patient is significantly more in muscle spasm today as a result of his increasing symptoms. It will be difficult in words to express how frustrated he appears today, how tense, how demoralized he has become over his inability to continue work, and how much his symptoms have increased. This is all despite efforts at lighter duties.

In reviewing his accrued record including the notes from Dr. Carlow, Dr. Halperin, Dr. Don Long at Johns Hopkins, and Dr. Peters of the Rehabilitation Unit at Lawrence & Memorial Hospital, it is quite clear that surgery is not in this patient’s best interest. Therefore, we do not have that ability to offer him relief of his multilevel cervical and lumbar disc disease. It is also clear from the progression in the chart from his initial injury in 1991, at which time x-rays of his neck and lumbosacral spine were unremarkable, his reinjury in 1992, and ultimately his MRI cervical and lumbar studies which revealed significant multilevel disease, that all of this is work related. To the best of my abilities to discern through the notes I have available there were no other

problems including falls or accidents in the patient's history that might have accounted for the problems we are seeing...

To review his studies, the patient has C3-4 disc space narrowing with bulged disc to the left, C4-5 disc space problems with a small bulge to the right that does not cause spinal stenosis or impingement of the dural sleeve, and C5-6 foraminal encroachment on the left. The largest osteophytes are at C4-5. At the lumbar level he has a protruded disc at L4-5 on the right without correlative neurologic symptoms. This was proven by CAT scan as well as MRI scan and 5 level disc disease including desiccated discs from L1-2 to the lowermost lumbosacral disc.

Attempts have been made to manage this patient's pain with a variety of muscle relaxants including Tranxene, Limbitrol, Skelazin, and Methocarbamol, to control his inflammatory symptoms with anti-inflammatory agents including Daypro and Orudis, Ultram for pain control and, finally, Darvocet. None of this has been effective. The patient is not now and has not been, while under my care, on narcotic strength pain medicine.

Based on a review of this patient's surgical interventions, the closest one of which was by Dr. Michael Halperin, all involved in his care have agreed that surgery will be fraught with a significant chance of no resolution of his symptoms. Thus, surgery has not been recommended. Bracing would result in significant loss of muscle tone and support through the cervical and lumbar spine.

The patient's management is for very light activities, constant position changes, and he should not be involved in sedentary work especially at a computer console without the ability to change position frequently. It is my recommendation that he is fit only for light category work, nonsendentary (sic). Moderate and heavy grades of work are eliminated and this will include bending to lift, stooping, crawling, climbing, activities that include repetitive bending, or repetitive lifting, and any activities that require exposure to cold, work above the level of his shoulders, or the wearing of any protective head gear which increases the weight of his head on his cervical spine.

The patient's rating as to the **Guides to the Evaluation of Permanent Impairment** as published by the **American Medical Association**, Fourth Edition, are as follows. Based on the injury model for 3 level cervical disc disease of severe nature, a 6% rating is appropriate for the first level, plus 1% for each of the other 2 levels, for a total of 8% whole person. For loss of range of motion in the cervical spine, loss of extension beyond 10^{o}, 5%, and for loss of lateral rotations beyond 40^{o} to the right and to

the left, 2% each, for a total due to loss of range of motion of 9%. This is a whole person rating. Table 3.3K will allow conversion to regional areas if necessary. For the lumbar spine, the severe nature of the rightward protruded L4-5 disc, 7%, plus 1% for each of the other 4 involved desiccated levels, for a total based on the injury model of 11% whole person. For loss of flexion beyond 45°, 2%, for loss of extension beyond 10°, 5%, for a total due to loss of range of motion model of 7%. Again, conversion to regional impairments can be performed by using Table 3.3K.

Based on this evaluation it is my opinion that the patient is not able to return to the work that is available for him at EB with or without medications. There is no surgical intervention that has been recommended and I concur with this. I have recommended that the patient consider exploring disability benefits as modalities of physical therapy, occupational therapy, and pain management have been tried. These are also not potentially helpful areas at this time.

The patient will continue on medications and we will continue to follow him conservatively at this point, according to Dr. Maletz.

Dr. Maletz reiterated his opinions at his October 5, 1999 deposition and the transcript of his testimony is in evidence as RX 15.

The Employer's Medical Director referred Claimant to the Norwich Rehabilitation Center for a functional capacity evaluation (FCE) and the test took place on September 3 and September 4, 1997 and lasted five (5) hours. The following report was sent to Dr. Kathryn Johnson at the Employer's Shipyard Hospital (ALJ EX 4):

FUNCTIONAL CAPACITY EVALUATION RESULTS
The actual test results indicate that Mr. Sankow is able to work at the SEDENTARY Physical Demand Level for an 8 hour day according to the Dictionary of Occupational Titles, U.S. Department of Labor, 1991. His specific acceptable Leg Lift capability was 10 lbs. However, there were indications of some submaximal effort; therefore, his actual functional ability must be left to conjecture...

A repeat of some tests is indicated after Mr. Sankow has been informed of his partial submaximal effort and the importance of giving good effort to help understand how his medical impairment is affecting his functional ability.

SUMMARY

Mr. Sankow was quite detailed concerning the impact that pain and his prescribed medications are having on his job performance.

On the first day of this evaluation, Mr. Sankow sat without taking a break for approximately 1.5 hours while filling out paperwork. During the medical interview, Mr. Sankow stated that he "hurt everywhere except for my forehead".

A worksite evaluation was performed on 9/6/97 at Electric Boat. The department's current supervisor, Ms. Gaudreau and the patient's former supervisor were consulted. The work pod in which Mr. Sankow worked consists of four computer terminals. The work stations are not adjustable to accommodate a worker who presents with the need to alternate between sitting and standing positions. The keyboard, mouse, and other hand controls (space ball) are not articulating. The work station is utilized by other shift workers and needs to be functional for all users.

This evaluator has serious concerns with Mr. Sankow returning to work because this gentleman does not see himself returning to work at EB. Mr. Sankow has stated that he did feel that working out of his home would allow him to alternate between computer work and resting in bed.

RECOMMENDATIONS

The following recommendations are based on the results of the FCE:

NOTE: Before any recommendation for a return to work, a trial period (2 week maximum) of work conditioning and simulation with basic pain management techniques may be beneficial. At the conclusion of this trial period, more definitive recommendations concerning Mr. Sankow's abilities could be made.

WORK CONDITIONING/SIMULATION

The results of the Functional Capacity Evaluation indicate that Mr. Sankow exerted some submaximal effort and had Equivocal test results; therefore, we cannot predict any success in a Work Conditioning program. We recommend that he be placed in a Work Conditioning program on a trial basis only, emphasizing strength, fitness, stabilization principles, body mechanics, sound ergonomic principles, and generic job simulations to improve his Physical Demand Level and enhance his employment opportunities. We will strongly encourage Mr. Sankow to begin exerting maximum effort during this program. Objective test data will determine if any progress is being achieved...

Dr. Johnson sent the following letter to Dr. Maletz on October

2, 1997 (ALJ EX 4):

Enclosed is an FCE ordered by National Insurance (SIC) on Fred Sankow. As you remember, he has been declared totally and permanently disabled. Based on his FCE however, I would suggest that modification of his worksite would allow him to return to work. An evaluation of his worksite was done with your restrictions on him in mind. One alteration would be to alter his computer workstation so that it could move from a sit to a stand level. If you are concerned that the stress of deadlines is a hardship on Mr. Sankow, I have been advised that there are positions in the Corporation for draftsman which have more flexible deadlines and are therefore less stressful and whereby he would be able to self pace. Since the FCE showed a very large exaggerated pain profile, I wonder if a formal pain management program might be profitable for this patient especially one which included a work conditioning program. Please advise me of how you wish to proceed.

The following notes reflect conversations between the Employer's workers' compensation representative and its Medical Director (ALJ EX 4):

Telephone Conversation 11/6/97
I spoke with Fred on the phone today — I strongly feel we are not going to be able to place Fred — there are too many issues — not only the medical issues but also the psychological over lay —

Next Office Visit
I asked if he had another appointment scheduled with Dr. Maletz — he said that his office said they would call - however he is going to call because he is low on his medication — I asked him to call me after he sees Dr. Maletz.

4/10 hrs
I questioned Fred as to why he chose to switch to the 4/10 hr days — he said to get another day's rest for his back — I asked if his back became worse when he made this shift — he said his back was bothering him a lot even when he was working 5/8 hr days —

Work place accommodations
I asked if it would be helpful if we changed his work station & moved him to another drafting area that does not have such tight schedules - he said no — because his level of pain made it very difficult for him to concentrate causing him to make mistakes.

Concerns
I strongly believe based upon Fred's medical issues & psychological over lay that it is not anyone's best interest to place him back in his drafting position at least at this time and probably never. I

also am concerned that forcing a placement could be dangerous to Fred, his family and EB. I am concerned that this would push him over the edge. If I recall correctly when I had my assessment interview with Fred he told me he was a Vietnam Veteran and his job was to "kill people."..

... He also has a lot of problems with depression.

I often find it very difficult to get any affect from Fred –

Medical Case Mgt.
I had recently asked Jack Shea if it would be helpful to put medical case management on this file. He suggested I discuss this with Dave Richardson. I have mixed feelings as I wonder if it would be helpful.

I note that there is also a handwritten note at the bottom of the page but it is illegible.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**,

620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of

causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he/she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer

must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption

is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic lumbar disc syndrome, resulted from working conditions at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz**

v. Sun Shipbuilding and Dry Dock Company, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his back on February 7, 1991, that that injury kept him out of work for about seven months, that he returned to work, initially on light duty, and then on regular duty, that he reinjured his back on July 1, 1992, an injury that also resulted in cervical problems, that that injury caused him to be out of work for various periods of time, as reflected on the January 23, 1997 Form LS-208 (RX 13), that the Employer has authorized appropriate medical care and treatment and has paid appropriate compensation benefits while he was unable to return to work and that Claimant timely filed a claim for benefits once a dispute arose between the parties. In fact, the crucial issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a shipfitter. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the

Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large

number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on July 14, 1997 and that he has been permanently and totally disabled from July 15, 1997, according to the well-reasoned opinion of Dr. Maletz (RX 11), at which time Claimant was forced to discontinue working as a result of the cumulative effect of his work-related injuries.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified**

on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 2), nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to the present time and continuing. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability

unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276(1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir.

1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer since July 25, 1977 (RX 12-1), (2) that he injured his back on February 7, 1991, (3) that this injury kept him out of work for about seven (7) months, (4) that the Employer paid appropriate compensation for that absence and has authorized appropriate medical care and treatment, (5) that the Employer accepted Claimant’s return to work with restrictions, (6) that Claimant injured his back and cervical areas on July 1, 1992 (RX 1), (7) that Claimant was out of work for various periods of time because of that injury, (8) that he was paid appropriate compensation benefits for those absences (RX 131), (9) that Claimant returned to work on sedentary duty in computer-generated drafting, (10) that he was able to perform these duties, although experiencing lumbar and cervical pain, (11) that the Employer retained Claimant as a valued employee until that date, July 14, 1997, (12) that Claimant was forced to stop working on July 14, 1997 because of the cumulative effects of his multiple medical problems, (13 that he has sustained previous work-related industrial accidents prior to July 2, 1992, (14) while working at the Employer's shipyard and (15) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his July 2, 1997 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Maletz. (RX 11, RX 15) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on July 2, 1992, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112

(1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

The Board has consistently held that, except in hearing loss cases, Section 8(f) only applies to schedule injuries exceeding 104 weeks. **Byrd v. Toledo Overseas Terminal**, 18 BRBS 144, 147 (1986); **Strachan Shipping Co. v. Nash**, 15 BRBS 386, 391 (1983), **aff'd in relevant part**, 760 F.2d 569 (5th Cir. 1985), **on reconsideration en banc**, 782 F.2d 513 (5th Cir. 1986).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22

BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

Moreover, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame,

such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977).

As found above, the Employer has satisfied the tri-partite requirements for Section 8(f) relief.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after December 16, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and the Employer shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Commencing on July 15, 1997, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $646.34, such compensation to be computed in accordance with Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his July 5, 1992 injury on and after July 15, 1997. The Employer shall also receive a refund, with appropriate interest, of any

overpayments of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on December 16, 1998.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln